IN THE UNITED STATES DISTRICT COURT
NORTHEN DISTRICT OF TEXAS
DALLAS DIVISION

CHARLA ALDOUS, P.C., d/b/a ALDOUS LAW FIRM and CHARLA ALDOUS	§	
Plaintiffs,	§	
v.	§	CIVIL ACTION NO. ________________
HOLLY BLACK, and DARWIN NATIONAL ASSURANCE COMPANY,	§	
Defendants.	§	

NOTICE OF REMOVAL

Pursuant to 28 U.S.C. § 1446(a), Defendant Darwin National Assurance Company ("Darwin") files this Notice of Removal and shows:

I. JURISDICTIONAL FACTS

1. Darwin is a defendant in the state court action styled *Charla G. Aldous, P.C., d/b/a Aldous Law Firm and Charla Aldous v. Holly Black and Darwin National Assurance Company,* Cause No. CC-12-06826-A, in the County Court at Law No. 1 of Dallas County, Texas.

2. Plaintiffs, Charla G. Aldous, P.C. d/b/a Aldous Law Firm and Charla Aldous ("Aldous"), filed their Original Petition in the state court action on November 14, 2012. On November 19, 2012, CT Corporation was served with a copy of the citation and Original Petition, as the service agent for Darwin. This Notice of Removal is therefore timely filed within thirty (30) days after Darwin was served in the state court action. *See* 28 U.S.C. § 1446(b).

3. This is a civil action over which this Court has original jurisdiction pursuant to 28 U.S.C. § 1332, and is one which may be removed to this Court pursuant to 28 U.S.C. § 1441, because the case is a civil action between citizens of different states wherein the matter in controversy exceeds the sum of $75,000, exclusive of interest and costs.

4. This lawsuit involves a dispute over reimbursement of attorney's fees and expenses for Aldous' own selected counsel defending Aldous, among others, in an underlying action for legal malpractice. *See* Plaintiff's Original Petition ¶¶ 15-24. The Petition alleges that:

- Darwin issued a policy and agreed to provide professional liability coverage to Aldous;
- A Claim was made that was covered by the policy;
- Darwin paid some but not all of the fees and expenses incurred in defense of Aldous; and
- Darwin misrepresented its rights under the policy concerning payment of attorney's fees and expenses for defense of Aldous, and Darwin is not entitled to any reimbursement for the fees and expenses it did pay out of the affirmative recovery of attorney's fees awarded to Aldous in the underlying lawsuit.

Id.

Based upon conclusory allegations, Aldous asserts causes of action against Darwin for breach of contract, violations of the Texas Insurance Code and Texas Deceptive Trade Practices Act, breach of the common law duty of good faith and fair dealing and a claim for assorted declaratory relief. *Id.* ¶¶ 28-45. The Petition also attempts to state a claim for negligent misrepresentation against defendant Holly Black, but it wholly fails to do so. *Id.* ¶¶ 8-13, 16 and 25.

Aldous does not assert a specific dollar amount of damages in its state court Petition. However, Darwin has paid over $473,000 on Aldous' behalf in the underlying action. Aldous' counsel in the underlying action submitted to the Court under oath that $2,054,178.18 of reasonable and necessary attorney's fees and expenses were incurred for the prosecution of affirmative claims, and $668,068.31 of reasonable and necessary attorney's and expenses was incurred in defense of counterclaims. *See* Declaration of Stephanie Lizotte, attached hereto as Exhibit "B" and incorporated herein. Aldous seeks payment from Darwin of all reasonable and necessary attorneys' fees and expenses incurred by them in defending against the underlying action. *Id.* Aldous also asserts that affirmative and defensive claims in the underlying action were inextricably intertwined, such that both were encompassed in Darwin's duty to defend. *Id.*; *see also* Plaintiff's Original Petition ¶21. Aldous also seeks three times the amount of her alleged damages and an 18% penalty pursuant to the Texas Insurance Code. *Id.* at ¶¶ 34, 35. Thus, the $75,000 amount in controversy requirement of 28 U.S.C. §1332 is satisfied by the damages asserted involved in this dispute.

5. Charla G. Aldous, P.C. is a professional corporation organized and existing under the laws of the State of Texas. Its principal place of business is in Dallas County, Texas. Petition ¶ 2. Under applicable law, therefore, Charla G. Aldous, P.C. is (both now and when this action was filed) a citizen of the State of Texas. Aldous individually is a citizen of Texas. *Id.* at ¶ 3.

6. Darwin is a corporation organized under the laws of Delaware and has its principal place of business in Delaware. Under applicable law, therefore, Darwin is (both now and when this action was filed) a citizen of the State of Delaware.

7. Aldous' Petition alleges that Holly Black is a Texas citizen. However, Black has been improperly joined as a defendant in this lawsuit and her citizenship should be disregarded for purposes of determining diversity jurisdiction, as more fully described below.

8. To the extent necessary, Black consents to the removal of this case.

II.
IMPROPER JOINDER

9. Under the doctrine of improper joinder, this Court should disregard the citizenship of nondiverse defendants when: 1) the plaintiff has fraudulently pleaded jurisdictional facts against the nondiverse defendant, 2) the plaintiff has no possibility of establishing a cause action against the nondiverse defendant, or 3) the claims against the nondiverse defendant have no real connection to the claims against the other defendants. *See Nava v. OneBeacon Am. Ins. Co.*, 2011 U.S. Dist. LEXIS 27027 at *9 -10 (W.D. Tex. Mar. 15, 2011). A plaintiff's failure to plead a legally sufficient factual basis for any element of the claims alleged against the nondiverse defendant constitutes the improper joinder circumstance in 2) above, as clearly exists here. *See Griggs v. State Farm Lloyds,* 181 F.3d 694, 700-02 (5th Cir. 1999); *Druker v. Fortis Health,* 2007 U.S. Dist. LEXIS 402 (S.D. Tex. Jan. 4, 2007).

10. Based on the Fifth Circuit's guidance from *Smallwood v. Illinois Central Railroad Co.,* the "inability of the plaintiff to establish a cause of action against the non-diverse party in state court" is one of the ways that a defendant like Darwin can establish improper joinder. 385 F.3d 568, 573 (5th Cir. 2004). In this case, "there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against [the] in-state defendant." *Id.* To resolve the issue, this court should "conduct a Rule 12(b)(6)-type analysis, looking initially at the allegations of the complaint to determine whether the complaint states a claim under state law." *Id.* at 574.

11. Aldous has not pleaded legally sufficient factual bases for the negligent misrepresentation claim that appears to be alleged against Black, and there is no possibility that Aldous can establish a viable cause of action against Black. Thus, the Court should disregard the citizenship of Black for diversity jurisdiction. *See Larroquette v. Cardinal Health 200, Inc.* 466 F.3d 373, 376 (5th Cir. 2006)(finding improper joinder where the "factual contentions cannot reasonably support" the legal claims asserted).

12. As set forth in paragraph 14 of the Original Petition, the alleged policy was issued by Darwin. Black was the agent to whom Aldous allegedly spoke in order to obtain professional liability coverage. In the Petition, Plaintiffs make two pages of allegations pertaining to Black, but most of those allegations describe Aldous and state things that she supposedly said or thought. The gist of the allegations made against Black are that she: (a) was an expert in serving the legal industry; (b) would place the coverage with an insurer that had a reputation for paying claims and did a large amount of business locally; (c) would have input into the selection of an adjuster in the event of a claim who would have ties to the community; and (d) would have influence with the adjuster and act as an advocate for plaintiffs in the event of a claim. These are insufficient to state a cause of action against Black individually for negligent misrepresentation. The bulk of these allegations amount to nothing more than non-actionable "puffery." *Griggs and Druker, supra.* Further, promises about future conduct with respect to handling a claim are not misstatements of existing fact as required to support a cause of action for negligent misrepresentation. *Allied Vista, Inc. v. Holt,* 987 S.W.2d 138, 141 (Tex. App.-Houston [14th Dist.] 1999, pet denied).

13. Thus, Aldous' pleading against Black wholly fails to allege facts to support the cause of action alleged against her. "Merely pleading a valid state law claim, or one whose

validity is reasonably arguable, against the resident defendant does not mean that the joinder of the resident defendant is not fraudulent." *Hornbuckle v. State Farm Lloyds,* 385 F. 3d 538, 542 (5^{th} Circ. 2004); *see also Jernigan v. Ashland Oil,* 989 F.2d 812 (5th Cir. 1993)(finding that a "conclusory allegation" is insufficient to preclude fraudulent joinder removal). In addition to identifying a legal cause of action recognized under the law, a petition must allege facts that support that cause of action. *Larroquette*, 466 F.3d at 377-78. "[W]hile a court must accept all of the factual allegations in the complaint as true, it need not credit bare legal conclusions that are unsupported by any factual underpinnings." *Tracy v. Chubb Lloyds Ins. Co.,* 2012 U.S. Dist. LEXIS 44984 at *5 (N.D. Tex. Mar. 30, 2012). Federal courts therefore permit removal despite improper joinder when the state court petition contains only puffery or conclusory allegations. *See Tracy,* 2012 U.S. Dist. LEXIS 44984 at *8; *Weldon Constr. Ltd. v. Fireman's Fund Ins. Co.,* 2009 U.S. Dist. LEXIS 43420 at *2 (N.D. Tex. May 22, 2009).

14. All in all, the court should disregard the citizenship of Black. For the reasons described above, there is no reasonable basis for the Court to predict that Aldous might be able to recover against Black. The Court is not required to guess the bases to make the claim viable against Black. A "reasonable basis 'means more than a hypothetical basis.'" *Icon Benefit Adm'rs II, L.P. v. Wachovia Ins. Servs.*, 2008 U.S. Dist. LEXIS 51580, *5 (N.D. Tex. July 3, 2008) (Lynn, J.) (citing *Griggs v. State Farm Lloyds*, 181 F.3d 694, 701 (5th Cir. 1999) ("whether the plaintiff has stated a valid state law cause of action depends upon and is tied to the factual fit between the plaintiffs' allegations and the pleaded theory of recovery")).

15. In light of the improper joinder of Black, and because Charla G. Aldous, P.C. and Aldous individually are citizens of Texas and Darwin is a citizen of Delaware, complete diversity of citizenship exists between the proper parties pursuant to 28 U.S.C. §1332.

16. Removal of this case to this Court is proper under 28 U.S.C. § 1441, because this is a civil action of which the district courts of the United States have original jurisdiction.

17. In accordance with 28 U.S.C. § 1446(a) and Local Rule 81, an index and copies of all process, pleadings, and orders filed in the state court action as of this date, and a copy of the court's docket sheet are attached hereto as Exhibit "A."

18. Promptly after the filing of this Notice of Removal, Darwin shall give written notice of the removal to Aldous through its attorneys of record and to the clerk of the state court as required by 28 U.S.C. § 1446(d).

WHEREFORE, Darwin requests that this action now pending against it in County Court at Law No. 1 of Dallas County, Texas, be removed to the United States District Court for the Northern District of Texas, Dallas Division, as an action properly removable thereto and seeks general relief.

Respectfully submitted,

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

By: /s/ R. Douglas Noah, Jr.
R. Douglas Noah, Jr.
State Bar No.: 15047500
Jay A. Brandt
State Bar No. 02882100
Thomas M. Spitaletto
State Bar No.: 00794679
Bank of America Plaza
901 Main Street, Suite 4800
Dallas, Texas 75270-3758
E-Mail: doug.noah@wilsonelser.com
E-Mail: thomas.spitaletto@wilsonelser.com
E-Mail: jay.brandt@wilsonelser.com
(214) 698-8000 (Telephone)
(214) 698-1101 (Facsimile)

ATTORNEYS FOR DEFENDANT, DARWIN NATIONAL ASSURANCE COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on all counsel of record via the Court's ECF electronic notice system on December 7, 2012.

/s/ Thomas M. Spitaletto
Thomas M. Spitaletto